

CAROLYN CAIRNS (WSBA #10856)
BRENDAN V. MONAHAN (WSBA #22315)
JUSTO G. GONZALEZ (WSBA #39127)
SARAH L. WIXSON (WSBA #28423)
STOKES LAWRENCE VELIKANJE MOORE & SHORE
120 N. Naches Avenue, Yakima, Washington 98901-2757
(509) 853-3000

[Additional Counsel Appear on Signature Page]

Attorneys for Defendant
EVANS FRUIT CO., INC.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

EQUAL EMPLOYMENT
OPPORTUNITY COMMISSION,

Plaintiff,

and

ELODIA SANCHEZ,

Plaintiff-Intervenor,

v.

EVANS FRUIT CO., INC.,

Defendant,

and

JUAN MARIN and ANGELITA
MARIN, a Marital community,

Defendants-Intervenors.

Case No.: CV-10-3033 LRS

DEFENDANT'S OPPOSITION TO
PLAINTIFFS' MOTION TO QUASH
(ECF NO.455)

DEFENDANT'S OPPOSITION TO PLAINTIFFS' MOTION
TO QUASH (ECF NO.455)

44815-009\1109985.DOCX

STOKES LAWRENCE
VELIKANJE MOORE & SHORE
120 N. NACHES AVENUE
YAKIMA, WASHINGTON 98901-2757
(509) 853-3000

1 **I. PLAINTIFFS HAVE NOT CONFERRED.**

2 Plaintiffs’ motion should not be heard because they have failed to comply with
3 the requirements of Local Rule 37.1. Under Local Rule 37.1, a motion pursuant to
4 Fed. R. Civ. P. 45 “will not be heard unless the parties have conferred and attempted to
5 resolve their differences. Plaintiffs made no effort to confer prior to bringing this
6 motion. On that basis alone, the motion to quash should be denied.

7 **II. CLAIMANTS’ MEDICAL RECORDS ARE RELEVANT AND**
8 **DISCOVERABLE**

9 **A. The Claimants’ Medical Records Are Relevant.**

10 Evans Fruit served subpoenas seeking medical records for four claimants who
11 allege that they suffered emotional distress due to sexual harassment. The scope of
12 discovery is broad. *Oppenheimer Fund v. Sanders*, 437 U.S. 340, 98 S. Ct. 2380, 57
13 L.Ed.2d 253 (1978). “Parties may obtain discovery regarding any matter, non
14 privileged, that is relevant to any party's claim or defense.” The party who resists
15 discovery must show that discovery is not allowed, and must clarify, explain, and
16 support its objections. *Blankenship v. Hearst Corp.*, 519 F.2d 418, 429 (9th Cir. 1975).

17 Claimants concede that mental health records are relevant, but assert that the
18 Court must draw a distinction between “medical records” and “mental health records”.
19 They assert that medical records are irrelevant. However, courts recognize that there is
20 considerable overlap between the two; medical records often include mental health
21 issues and also include “physical conditions tied to mental health.” *Fitzgerald v. Cassil*,
22 216 F.R.D. 632, 634 (N.D.Cal.2003). The characterization of the records is less
23
24

1 important than their substance. Relevant information, from whatever source, is
2 discoverable.

3 Claimants' medical and psychological records are relevant as to both causation
4 and the extent of claimant's alleged damages for "mental anguish, and emotional and
5 physical distress." *See* Second Amended Complaint in Intervention, ¶ 6.5. Medical
6 records are also relevant to Evans Fruit's defenses against the emotional distress claims
7 because the records may reveal another source of stress unrelated to Evan Fruit which
8 may have affected a claimant's emotional distress or a medical condition which has
9 affected her ability to work.

10 **B. Claimants' Medical and Mental Health Records are Discoverable**

11 **1. Claimants Have Not Demonstrated That Any of the Records**
12 **Sought Contain Privileged Communications.**

13 Claimants argue that any relevant mental health information that might be
14 gleaned from their medical records is privileged and therefore not discoverable.
15 "[C]onfidential communications between a licensed psychotherapist and her patients in
16 the course of diagnosis or treatment are protected from compelled disclosure." *Jaffee v.*
17 *Redmond*, 518 U.S. 1, 5, 116 1923 (1996). Under *Jaffee*, the party seeking to invoke the
18 benefit of the privilege bears the burden of showing: 1) the therapist is licensed, 2) the
19 communications were confidential, and 3) the communications were made during the
20 course of diagnosis or treatment. *United States v. Romo*, 413 F.3d 1044, 1047 (9th Cir.
21 2005); *Speaker v. County of San Bernardino*, 82 F. Supp. 2d 1105, (C.D.Cal.2000)
22 (burden of proof for the psychotherapist/patient privilege is on the party seeking to
23 establish that the privilege exists).

1 Claimants have not presented evidence establishing (or even suggesting) that any
2 of their health care providers at Mid Valley Community Clinic or Sunnyside
3 Community are licensed therapists or that any privileged communications were made.
4 They simply assert that the records cannot be disclosed. Claimants' bare assertion does
5 not meet their burden of establishing privilege.

6 **2. Even If a Privilege Exists, It Has Been Waived.**

7 Even where a psychotherapist-patient privilege is established, the privilege is not
8 absolute; it may be waived. *Jaffee*, 518 U.S. at 15 n. 14. The difficulty lies in
9 determining when waiver occurs.

10 Neither the United States Supreme Court nor the Ninth Circuit has addressed
11 when waiver occurs. Lower courts disagree on the test to determine whether the
12 privilege is waived. Some apply a broad test, finding a waiver of the privilege
13 whenever emotional distress is alleged and damages are sought. *See e.g., Sanchez v.*
14 *U.S. Airways Inc.*, 202 F.R.D. 131 (E.D.Pa.2001); *Doe v. City of Chula Vista*, 196
15 F.R.D. 562, 567 (S.D.Cal.1999); *Doverspike v. Chang O'Hara's Bistro, Inc.*, 2004 WL
16 5852443, 2–3 (D.Minn.2004) (“As between the two approaches, the cases finding that
17 even garden-variety distress claims waive applicable privileges are better reasoned ...
18 emotional distress is either part of the case or it is not.”).

19 Others use a narrow approach and decline to find waiver unless the emotional
20 distress claims are more than mere “garden variety.” *See e.g., Ruhlmann v. Ulster Co.*
21 *Dept. of Social Serv.*, 194 F.R.D. 445 (N.D.N.Y.2000); *Speaker ex rel. Speaker v.*
22 *County of San Bernardino*, 82 F. Supp. 2d 1105 (C.D.Cal.2000); *Fritsch v. City of*
23
24

1 *Chula Vista*, 196 F.R.D. 562, 568 (C.D.Cal.1999); *Vanderbilt v. Town of Chilmark*, 174
2 F.R.D. 225, 225-30 (D.Mass.1997).

3 Class members, Esmeralda Aviles, Vanessa Aviles, Carina Gutierrez and
4 Veronica Reyna seek compensation for emotional distress damages. That fact alone
5 meets the criteria under the broad test. But claimants assert that the Court should adopt
6 the “narrow test” and find that their medical information is not discoverable because
7 they are only seeking “garden variety” emotional distress. Their claim for privilege
8 fails under either test because claimants’ claims are not “garden variety.” “Garden-
9 variety” emotional distress “‘is ordinary or commonplace emotional distress.’” *Doyle v.*
10 *Gonzales*, 2011 WL 1584345 *1, fn2 (E.D. Wash) (citing *Ruhlmann v. Ulster Cnty.*
11 *Dep’t of Soc. Servs.*, 194 F.R.D. 445, 448 n. 6 (2000)). “Emotional distress is not
12 ‘garden variety’ if it results in a specific psychiatric disorder or disables one from
13 working.” *Id.* Rather, garden-variety claims for emotional distress are “claims of
14 generalized insult, hurt feelings, and lingering resentment” that “do not involve a
15 significant disruption of the plaintiff’s work life and rarely involve more than a
16 temporary disruption of the claimant’s personal life.” *Ortiz v. Potter*, 2010 WL
17 796960* 3 (citing *Javeed v. Covenant Med. Ctr., Inc.*, 218 F.R.D. 178, 179 (N.D.Iowa
18 2001)).

19 Although Claimants’ motion to quash characterizes their distress as merely
20 “garden variety”, this is another instance where characterization is less important than
21 substance. Esmeralda Aviles and Vanessa Aviles have intervened in this matter
22 asserting “mental anguish” which resulted in both “emotional and physical distress”. At
23 deposition, Esmeralda Aviles and Vanessa Aviles testified that after the alleged
24

1 harassment they can no longer work independently; they now only feel comfortable
2 working in the company of their mother. Declaration of Sarah Wixson (“Decl.
3 Wixson”), Ex. A, Dep. of Esmeralda Aviles, p. 42, lines 16 - 22, Ex. B, Dep of Vanessa
4 Aviles, p. 49, lines 11-15. Carina Gutierrez testified that she cried for two months after
5 she left Evans Fruit, and that even now every time she thinks about the harassment she
6 will “break down crying”. Decl. Wixson, Ex. C, Dep. of Carina Gutierrez, p. 79. The
7 emotional distress Claimaints describe in their own words and under oath is more than
8 mere “garden variety.”

9 **3. Emotional Distress is the Crux of the Damages Claim and the**
10 **Distress Could Have Been Caused by Other Factors.**

11 The claimants’ asserted emotional distress is the crux of their claim for damages.
12 The only damages they are seeking are for emotional distress. Courts confronted with
13 similar facts have compelled discovery of medical records. For example, in *EEOC v.*
14 *California Psychiatric Transitions*, 258 F.R.D. 391 (E.D.Cal.2009), the court weighed
15 both the broad and narrow approaches to discovery of medical records and decided that
16 the broad approach should be applied because the plaintiff’s claim for emotional distress
17 damages formed the “crux” of her claim and could have been caused by something
18 other than the alleged sexual harassment. The court allowed discovery under basic
19 fairness principles:

20 To allow Plaintiffs to make a claim for emotional distress, but shield
21 information related to their claim, is similar to shielding other types
22 of medical records. For instance, if the injury at issue were to the knee,
23 and Plaintiff had sustained a subsequent knee injury requiring treatment,
24 Plaintiffs would not be able to hide the details of the subsequent knee
injury because of privilege or privacy considerations. In order to
allege and recover for a harm, Plaintiffs need to show the existence

1 and extent of the harm. The particular value of the harm is best
2 left to the fact-finder, after a careful view of the facts.

3 The only way to adequately review the facts is to bring to light
4 relevant information.

5 *Id.* at 400 (citing *Sanchez v. U.S. Airways, Inc.*, 202 F.R.D. 131, 136 (E.D. Pa. 2001)).

6 Claimants try to differentiate their claims from *EEOC v. California Psychiatric*
7 *Transitions*, by asserting that there is no “multiple causation” issue here. However,
8 there is no way to verify Claimants’ bald assertion if Evans Fruit is denied access to
9 their medical records.

10 Claimants have asserted that Evans Fruit caused their “mental anguish” and
11 “emotional and physical distress”, but they want to limit the evidence on this point to
12 their testimony. The discovery process must be fair to all parties so that each side is
13 able to present an effective and complete case to the jury. For each item of damages,
14 whether economic or non-economic, the claimants must show that the damage was
15 proximately caused by the defendants’ unlawful conduct. Evans Fruit is entitled to
16 show that other factors contributed to the plaintiff’s damage. *See, e.g., Vance v. Southern*
17 *Bell Tel. and Tel. Co.*, 863 F.2d 1503, 1516 (11th Cir.1989) (district court reduced jury’s
18 monetary award for emotional harm caused by racial discrimination because “there were
19 many other unpleasant factors in her life which almost certainly contributed to her
20 emotional distress”); *Hamilton v. Rodgers*, 791 F.2d 439, 444 - 45 and fn. 3 (5th
21 Cir.1986) (allowing compensatory damages when plaintiff endured for emotional injury
22 from his work environment, but reversing award attributed to plaintiff’s physical decline
23 because “insufficient certainty as to causation exists” as his health had been failing due
24 to his smoking, diet, and family history of hypertension).

1 Evans Fruit has a right to thoroughly investigate and challenge the allegations
2 against it, to rebut the Claimants' evidence and testimony and to determine whether the
3 Claimants have relevant medical history that indicates their emotional distress was
4 caused by events and circumstances independent of defendants' asserted conduct.
5 Whether medical records indicate complaints of psychic injury in the first instance
6 would itself be probative of Claimants' allegations. Plaintiffs seek up to \$350,000 in
7 statutory damages under Title VII plus general and punitive damages in extraordinary
8 amounts for "emotional distress" that includes "emotional and physical distress" and
9 "loss of enjoyment of life", Evans Fruit must be permitted to prepare its defense,
10 challenge their claims and explore in discovery other circumstances that may have
11 caused the alleged injury.

12 **C. Claimants' Privacy Interests are Comprehensively Addressed by the**
13 **Protective Order Entered in this Case.**

14 There are several ways to protect the Claimants' privacy interests while still
15 allowing Evans Fruit to prepare its defense. First, no claimant is compelled to put her
16 mental health at issue. She may decline to bring a claim for emotional distress damages
17 if her interest in maintaining her privacy is particularly strong. Second, the Protective
18 Order entered by the Court on June 22, 2011 (ECF No. 293) provides comprehensive
19 protections for Claimants' privacy -- Evans Fruit would have offered to designate
20 records and information obtained from the Mid-Valley Community Clinic and
21 Sunnyside Community Hospital as "Confidential" or "Highly Confidential - Attorneys'
22 Eyes Only" had plaintiffs' counsel conferred as they were required to do under LR 37.1.
23 Third, the Court has discretion to fashion an appropriate mechanism for discovery and
24

1 use of sensitive information. *Id.* The Court determines the ultimate admissibility of the
2 evidence through a Rule 403 balancing analysis at trial.

3 **III. CONCLUSION**

4 Claimants assert that Evans Fruit is entitled to no medical records or mental
5 health records whatsoever. They assert that none of the four claimants have multiple
6 causation issues and that their word is the only evidence needed on that issue. However,
7 to prohibit access to these records outright would allow the claimants to proceed with
8 their claims on unequal terms, effectively denying Evans Fruit of the due process
9 protections afforded by the Federal Rules of Civil Procedure. Evans Fruit respectfully
10 requests that the Court deny the Claimants' Motion to Quash and allow discovery on the
11 issue of causation and damages to proceed.

12 DATED this 4th day of January, 2012.

13 s/Sarah L. Wixson

14 Carolyn Cairns (WSBA #10856)

15 Brendan V. Monahan (WSBA #22315)

16 Justo G. Gonzalez (WSBA #39127)

17 Sarah L. Wixson (WSBA #28423)

18 STOKES LAWRENCE VELIKANJE MOORE
& SHORE

19 120 N. Naches Avenue

20 Yakima, WA 98901-2757

21 Telephone: (509) 853-3000

22 Fax: (509) 895-0060

23 Email: cc@stokeslaw.com

24 bvm@stokeslaw.com

jgg@stokeslaw.com

slw@stokeslaw.com

1 GERALD L. MAATMAN, JR. (pro hac vice)
2 CHRISTOPHER J. DEGROFF (pro hac vice)
3 ASILIA S. BACKUS (pro hac vice)
4 SEYFARTH SHAW LLP
5 131 South Dearborn Street, Suite 2400,
6 Chicago, IL 60603
7 (312) 460-5000

8 LAURA J. MAECHTLEN (pro hac vice)
9 SEYFARTH SHAW LLP
10 560 Mission Street, Suite 3100,
11 San Francisco, CA 94105
12 (415) 397-2823

13 Attorneys for Defendant
14 EVANS FRUIT CO., INC.
15
16
17
18
19
20
21
22
23
24

1 **CERTIFICATE OF SERVICE**

2 I hereby certify that on January 4, 2012, I caused the foregoing document to be:

3 ☒ electronically filed with the Clerk of the Court using the CM/ECF system which
4 will send notification of such filing to the following:

- 5 • **Daniel Robbins Case** rob@lbplaw.com,cheryl@lbplaw.com
6 • **Jamal Whitehead** jamal.whitehead@eeoc.gov
7 • **May R Che** may.che@eeoc.gov,victoria.richardson@eeoc.gov
8 • **Carmen Flores** carmen.flores@eeoc.gov,victoria.richardson@eeoc.gov,
9 • mary.hammock@eeoc.gov
10 • **Blanca E Rodriguez** blancar@nwjustice.org,alexg@nwjustice.org
11 • **Debra A Smith** debra.smith@eeoc.gov,lorraine.strayhorn@eeoc.gov
12 • **John F Stanley** john.stanley@eeoc.gov,mary.hammock@eeoc.gov
13 • **William R. Tamayo** william.tamayo@eeoc.gov

14 s/Sarah L. Wixson

15 Sarah L. Wixson (WSBA #28423)

16 Attorney for Defendant Evans Fruit Co., Inc.

17 Stokes Lawrence Velikanje Moore & Shore

18 120 N. Naches Avenue

19 Yakima, WA 98901-2757

20 Telephone: (509) 853-3000

21 Fax: (509) 895-0060

22 sarah.wixson@stokeslaw.com